Sykt Hing Lee Fishing (Sabah) Sdn Bhd v Lin Yun Thai & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01(NCVC)(W)-511–12 OF 2017
TENGKU MAIMUN, ABANG ISKANDAR AND MARY LIM JJCA
12 MARCH 2019

Limitation — Period of limitation — When time bar began to run — Land Ordinance of Sabah ('SLO'), ss 3 and 18 and Item 77 of Schedule thereto — Deceased co-owners of land gave title deeds and memorandum of transfer signed in escrow to moneylender ('appellant') as security for loan — Parties agreed that if co-owners defaulted in repayment of loan appellant could transfer land into its name — Whether more than 30 years after appellant had transferred land into its name on co-owners' default their beneficiaries staying on the land could claim fraud to resist appellant's action for vacant possession — Whether counterclaim by beneficiaries to set aside transfer of land into appellant's name time-barred under s 3 of the SLO — Whether beneficiaries' argument that time only ran after they recently discovered fraud had no merit — Whether even if fraud existed the deceased co-owners of the land would have known of it during their lifetimes but they did nothing — Whether right of action to set aside transfer of land on ground of fraud (if any) belonged to the co-owners and not to the beneficiaries — Whether beneficiaries (without letters of administration to estates of deceased co-owners) had no separate or independent right of action in respect of the land — Whether allegation of fraud not proven — Limitation Ordinance (Sabah Cap 2), s 18 and item 77 of Schedule

Sometime in 1984, three brothers ('the Chong brothers'), who jointly owned a piece of land, borrowed RM60,000 from the appellant, a licensed moneylender, using the land as security. They gave a power of attorney ('PA') to a John Voo to sign on their behalf the loan document with the appellant and a memorandum of transfer ('MOT') in escrow. The MOT and the original title to the land were then deposited with the appellant's solicitor on the understanding that if the Chong brothers defaulted in repayment of the loan, the appellant was entitled to use the MOT to transfer the land into its name. The Chong brothers defaulted in their loan repayment, and sometime in 1987 the appellant used the MOT to transfer the land into its name. In 2015, long after the Chong brothers had died, the appellant discovered that the land was occupied by the first to the fifth respondents ('the respondents') without its knowledge, consent or permission. Wooden houses and other structures had been built on the land complete with electricity supply. The first and second respondents were the wives of two of the Chong brothers while the fourth and

fifth respondents were their sons who claimed to be beneficiaries under the respective deceased's estates. In response to the appellant's suit against them for vacant possession of the land, the respondents denied the claim and challenged the validity of the transfer of the land to the appellant. They said the Chong brothers and their families had been living on the land since 1969 without interference or objection from anyone including the appellant. The respondents claimed they only came to know about the appellant's ownership of the land when they were served with the cause papers for the vacant possession proceedings. They alleged that the transfer of the land to the appellant was fraudulent and that John Voo had acted beyond his powers under the PA. The first, fourth and fifth respondents raised a counterclaim against the appellant, John Voo (who by then had died) and the sixth and seventh respondents. No claim was made in the counterclaim against the sixth respondent, nor did that respondent itself make any claim or partake in the trial. The seventh respondent was named only for the purpose of executing any order made by the court if the counterclaim was allowed. The counterclaim against John Voo (for damages for fraud) was withdrawn. Vis a vis the appellant, the respondents sought damages for fraud, a declaration that the registration of the land in the appellant's name was invalid and an order reinstating the Chong brothers as owner of the land. Inter alia, the appellant contended that the counterclaim was time-barred under s 3 of Sabah's Limitation Ordinance read with item 77 of the Schedule thereunder. It also questioned the locus standi of those who raised the counterclaim on the ground they had not secured letters of administration to act on behalf of the respective estates of the deceased. In dismissing the appellant's claim and allowing the counterclaim, the High Court did not deal with the limitation issue at all. With respect to the other issues, it held, inter alia, that: (a) the respondents had locus standi to raise the counterclaim; (b) John Voo had acted outside the terms of his PA; and (c) the transfer of the land to the appellant was fraudulent and void. The instant appeal was against the trial court's decision.

Held, unanimously allowing the appeal, setting aside the High Court's decision and allowing the appellant's claim for vacant possession of the land:

(1) The respondents had locus standi to file their counterclaim as beneficiaries sans letters of administration as their counterclaim was filed to protect and preserve the estates of two of the deceased Chong brothers and such intent amounted to special circumstances as held by the Federal Court in *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297 (see para 35).

(2) The defence and counterclaim sought to disabuse the appellant of its title to the land which was registered in 1987. Since the registration was effected nearly 30 years ago, the respondents' counterclaim filed on

6 January 2017 was, ex facie, time-barred. Limitation was a complete defence to the counterclaim and the trial judge ought to have dismissed the counterclaim on that sole ground and allowed the appellant's claim (see paras 41–42).

(3) The court could not agree with the respondents' contention that the counterclaim cum defence was valid and within time since they only knew about the transfer of the land to the appellant — and thereby the alleged fraud connected therewith — when they were served with the cause papers relating to the vacant possession application in 2016. A reading of both s 18 and item 77 of the Limitation Ordinance showed that time began to run when the alleged fraud became known 'to the party wronged' or to the 'person having a right to institute the suit'. In either case of s 18 or item 77, that party was necessarily the Chong brothers and not the respondents. The right of action to set aside the registration of title to the land on the ground of fraud belonged to the Chong brothers and not to the respondents since the allegations of fraud related to the loan agreement, the PA and the MOT, all of which were matters that were personal to and within the knowledge of the Chong brothers. Only if the Chong brothers had established a claim against the appellant could the respondents, as their beneficiaries, assert any claim or interest to remain on the land. The respondents themselves did not have any separate or independent right of action in respect of the land. Their claim was entirely representative of each of the estates of the Chong brothers (see paras 43–44 & 48–55).

(4) The respondents failed to discharge the burden of proving that their claim, which should or would have been brought by the Chong brothers during their lifetimes, was not caught by s 3 read together with s 18 and item 77 of the Limitation Ordinance. There was ample evidence to show that if there was fraud as alleged, the Chong brothers would have known of it and would in all common sense have taken the appropriate action, yet they did nothing. Such inaction over a long lapse of time, coupled with all the other evidence, invited the reasonable inference that there was in fact no fraud committed by the appellant against the Chong brothers, compelling the court to invoke the doctrine of laches against the respondents (see paras 59, 65–66, 76–84 & 109).

(5) The respondents fell far short of even the standard of civil liability in proving the existence of fraud. Even on balance of probabilities, the finding by the trial judge that fraud existed was not sustainable whether in law or on the facts. The trial judge made an erroneous construction of the terms of the PA. The PA created a relationship of principal and agent between the Chong brothers and John Voo. As agent, cloaked with the powers given him under the PA, John Voo's entry into the loan agreement

and the signing of the MOT in escrow could not amount to fraud. Even if John Voo had, without authority, done any acts or incurred any obligations to third parties, such as the appellant, on behalf of the Chong brothers, the latter were bound by those acts or obligations under s 190 of the Contracts Act 1950 (see paras 102–103 & 106).

[Bahasa Malaysia summary

Pada tahun 1984, tiga adik-beradik lelaki ('adik-beradik Chong'), yang bersama-sama memiliki sebidang tanah, meminjam RM60,000 daripada perayu, pemberi pinjaman wang berlesen, menggunakan tanah tersebut sebagai jaminan. Mereka memberikan surat kuasa wakil ('PA') kepada seorang John Voo untuk menandatangani bagi pihak dokumen pinjaman mereka dengan perayu dan memorandum pindah milik ('MOT') dalam eskrow. MOT dan hakmilik asal tanah tersebut kemudiannya didepositkan dengan peguam perayu atas persefahaman bahawa jika adik-beradik Chong gagal dalam pembayaran balik pinjaman, perayu berhak menggunakan MOT untuk memindahkan tanah tersebut ke namanya. Adik-beradik Chong gagal dalam pembayaran balik pinjaman mereka, dan pada tahun 1987, perayu menggunakan MOT untuk memindahkan tanah tersebut ke namanya. Pada tahun 2015, lama selepas adik-beradik Chong telah meninggal dunia, perayu mendapati bahawa tanah tersebut diduduki oleh responden pertama hingga kelima ('responden') tanpa pengetahuan, persetujuan atau kebenarannya. Rumah kayu dan struktur lain telah dibina di atas tanah lengkap dengan bekalan elektrik. Responden pertama dan kedua ialah isteri-isteri dua adik-beradik Chong manakala responden keempat dan kelima adalah anak lelaki mereka yang mendakwa sebagai waris di bawah estet si mati. Sebagai jawapan terhadap saman perayu terhadap mereka untuk pemilikan kosong tanah tersebut, responden menafikan tuntutan tersebut dan mencabar kesahihan pemindahan tanah kepada perayu. Mereka berkata adik-beradik Chong dan keluarga mereka telah tinggal di tanah tersebut sejak tahun 1969 tanpa gangguan atau bantahan dari sesiapa termasuk perayu. Responden mendakwa mereka hanya mengetahui tentang pemilikan tanah perayu apabila mereka disampaikan dengan kertas kausa untuk prosiding pemilikan kosong. Mereka mendakwa bahawa pemindahan tanah kepada perayu itu adalah fraud dan bahawa John Voo telah bertindak di luar kuasanya di bawah PA. Responden pertama, keempat dan kelima membangkitkan tuntutan balas terhadap perayu, John Voo (yang kemudiannya mati) dan responden keenam dan ketujuh. Tiada tuntutan dibuat dalam tuntutan balas terhadap responden keenam, atau responden itu sendiri membuat tuntutan atau mengambil bahagian dalam perbicaraan. Responden ketujuh dinamakan hanya untuk tujuan melaksanakan apa-apa perintah yang dibuat oleh mahkamah jika tuntutan balas tersebut dibenarkan. Tuntutan balas terhadap John Voo (untuk ganti rugi untuk fraud) telah ditarik balik. Melalui perayu, responden

A memohon ganti rugi untuk fraud, satu perisytiharan bahawa pendaftaran tanah dalam nama perayu tidak sah dan satu perintah mengembalikan semula adik-beradik Chong sebagai pemilik tanah tersebut. Antara lain, perayu berpendapat bahawa tuntutan balas itu telah dibatasi masa di bawah s 3 Ordinan Had Masa Sabah yang dibaca dengan item 77 Jadual di bawahnya. Ia B juga mempersoalkan locus standi mereka yang membangkitkan tuntutan balas atas alasan mereka tidak memperoleh surat pentadbiran untuk bertindak bagi pihak estet masing-masing oleh si mati. Dalam menolak tuntutan perayu dan membenarkan tuntutan balas tersebut, Mahkamah Tinggi tidak menangani isu had masa sama sekali. Berkenaan dengan isu-isu lain, mahkamah C memutuskan, antara lain, bahawa (a) responden mempunyai locus standi untuk menimbulkan tuntutan balas; (b) John Voo telah bertindak di luar terma PA nya; dan (c) pemindahan tanah tersebut kepada perayu adalah fraud dan tidak sah. Rayuan ini adalah terhadap keputusan mahkamah bicara.

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Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan tuntutan perayu untuk pemilikan kosong tanah:

(1) Responden mempunyai locus standi untuk memfailkan tuntutan balas mereka sebagai benefisiari tanpa surat pentadbiran kerana tuntutan balas E mereka telah difailkan untuk melindungi dan memelihara estet dua adik-beradik Chong yang meninggal dunia dan niat tersebut berjumlah dalam keadaan khas seperti yang diputuskan oleh Mahkamah Persekutuan dalam *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297 (lihat perenggan 35).

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(2) Pembelaan dan tuntutan balas dipohon untuk membebaskan perayu daripada hakmiliknya ke tanah yang didaftarkan pada tahun 1987. Oleh kerana pendaftaran tersebut telah dilaksanakan hampir 30 tahun yang lalu, tuntutan balas responden yang difailkan pada 6 Januari 2017 adalah, terlebih dahulu, dihalang masa. Had masa adalah pembelaan G yang lengkap terhadap tuntutan balas dan hakim bicara patut menolak tuntutan balas atas alasan tunggal tersebut dan membenarkan tuntutan perayu (lihat perenggan 41–42).

(3) Mahkamah tidak boleh bersetuju dengan pandangan responden bahawa H tuntutan balas merangkap pembelaan tersebut adalah sah dan dalam waktu kerana mereka hanya mengetahui tentang pemindahan tanah tersebut kepada perayu — dan dengan itu fraud yang didakwa berkaitan dengannya — apabila mereka disampaikan dengan kertas kausa berkaitan dengan permohonan pemilikan kosong pada tahun 2016. I Bacaan kedua-dua s 18 dan item 77 Ordinan Had Masa menunjukkan bahawa masa mula berjalan apabila fraud yang dikatakan diketahui 'kepada pihak yang teraniaya' atau kepada 'orang yang mempunyai hak untuk memulakan guaman'. Dalam mana-mana kes s 18 atau item 77, pihak tersebut sepatutnya adik-beradik Chong dan bukan responden.

Hak tindakan untuk mengetepikan pendaftaran hakmilik tanah atas alasan penipuan adalah milik adik-beradik Chong dan bukan responden kerana tuduhan penipuan yang berkaitan dengan perjanjian pinjaman, PA dan MOT, kesemuanya adalah perkara-perkara peribadi dan dalam pengetahuan adik-beradik Chong. Sekiranya adik-beradik Chong telah membuat tuntutan terhadap perayu, responden, sebagai benefisiari mereka, boleh menuntut sebarang tuntutan atau kepentingan untuk kekal di atas tanah tersebut. Responden sendiri tidak mempunyai hak tindakan berasingan atau bebas berkenaan dengan tanah tersebut. Tuntutan mereka sepenuhnya mewakili setiap estet adik-beradik Chong (lihat perenggan 43–44 & 48–55).

(4) Responden gagal untuk melepaskan beban pembuktian bahawa tuntutan mereka, yang sepatutnya atau akan dibawa oleh adik-beradik Chong semasa hayat mereka, tidak ditangkap oleh s 3 dibaca bersama dengan s 18 dan item 77 Ordinan Had Masa. Terdapat keterangan yang mencukupi untuk menunjukkan bahawa jika terdapat fraud seperti yang dikatakan, adik-beradik Chong akan tahu mengenainya dan akan dalam semua akal mengambil tindakan yang sesuai, namun mereka tidak melakukan apa-apa. Kelakuan sedemikian sepanjang masa, ditambah dengan keterangan lain, menarik kesimpulan yang munasabah bahawa sebenarnya tiada fraud yang dilakukan oleh perayu terhadap adik-beradik Chong, memaksa mahkamah untuk mengajukan doktrin laches terhadap responden (lihat perenggan 59, 65–66, 76–84 & 109).

(5) Responden jatuh jauh dari standard liabiliti sivil dalam membuktikan kewujudan fraud. Walaupun pada imbangan kebarangkalian, penemuan oleh hakim bicara bahawa penipuan wujud adalah tidak mampan sama ada dalam undang-undang atau fakta. Hakim bicara membuat interpretasi salah terhadap terma PA. PA mewujudkan hubungan prinsipal dan ejen antara adik-beradik Chong dan John Voo. Sebagai ejen, berlindung dengan kuasa yang diberikan kepadanya di bawah PA, kemasukan John Voo ke dalam perjanjian pinjaman dan menandatangani MOT dalam eskrow tidak boleh dianggap sebagai fraud. Walaupun John Voo telah, tanpa kuasa, melakukan apa-apa tindakan atau menanggung apa-apa kewajipan kepada pihak ketiga, seperti perayu, bagi pihak adik-beradik Chong, mereka terikat dengan tindakan mereka atau kewajipan di bawah Akta Kontrak 1950 (lihat perenggan 102–103 & 106).]

Notes

For cases on when time bar began to run, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2622–2627.

Cases referred to

Al Rashidy bin Kassim & Ors v Rosman bin Roslan [2007] 4 MLJ 297, FC (folld)

Assets Company Limited v Mere Roihi and Others (Consolidated Appeals) [1904-07] All ER Rep Ext 1599; [1905] AC 176, PC (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)

Hj Suratmin bin Hj Othman v Yusof bin Hj Omar & Ors [1997] MLJU 203; [1988] 2 CLJ Supp 380, HC (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)

Lim Kim Hua v Ho Chui Lan & Anor [1995] 3 MLJ 165, HC (refd)

Loi Hieng Chiong v Kon Tek Shin [1983] 1 MLJ 31, FC (refd)

Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504, FC (refd)

PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen [1998] 1 MLJ 465, FC (refd)

Sha Kannan & Anor v Arunachalam a/l Venkatachalam & Anor and another appeal [2017] MLJU 1568; [2017] MLRAU 1, CA (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Waimaiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101, PC (refd)

Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal [2014] 1 MLJ 645; [2013] 9 CLJ 577, CA (refd)

Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799; [2014] 2 CLJ 445, FC (refd)

Legislation referred to

Contracts Act 1950 s 190

Limitation Act 1953

Limitation Ordinance (Sabah Cap 2) ss 3, 18, Schedule, items 73, 77, 92, 110, 112

Rules of Court 2012 O 89

Appeal from: Suit No TWU-22NCVC-1/1 of 2017 (High Court, Tawau)

David Fung (Daphne Wong Teck Mee with him) (Chang & Wong Partners) for the appellant.

Kong Hon Ming (Lee & Kong) for the first, second, third, fourth and fifth respondents.

Mary Lim JCA (delivering judgment of the court):

[1] This was a claim for vacant possession by the appellant, the registered landowner of land held under CL 105248397 in the district of Tawau ('the said land'). The respondents were alleged to be trespassers who had stayed on the said land without its consent or licence. This was disputed by the respondents who counterclaimed against the appellant, and certain other parties, alleging that the relevant documents upon which the appellant claimed ownership were illegal and void, and for the land to be returned to the original landowners.

[2] After a full trial, the learned judge dismissed the appellant's claim and allowed the counterclaim. On appeal and upon careful deliberations of the submissions, records of appeal and the decision of the learned judge, we unanimously allowed the appeal. These are our reasons in full.

SALIENT BACKGROUND FACTS

[3] Three 'brothers', Chong Eang Kui, Chong Shak Yong and Robert Tan Lo Ming (all deceased, and collectively referred to as the 'Chong brothers'), borrowed RM60,000 from the appellant, a licensed moneylender and also in the business of processing and selling of fish and prawns. A loan document dated 10 March 1984 reflecting the loan was executed by their attorney, one John Voo Hong Kong ('John Voo'), appointed through a power of attorney dated 9 August 1983. The loan was repayable within two months together with interest at the rate of 15%pa.

[4] The Chong brothers, co-owners holding undivided shares in the said land placed their land as security for the loan. The original title deeds to the said land were placed with Messrs Lee Tain Soong & Co, solicitors for the appellant. We understand this legal firm has since ceased practice.

[5] The Chong brothers agreed that, in the event of any default in repayment of the loan, the appellant would transfer the said land into either the appellant's name or the name of its nominees. A memorandum of transfer in escrow was executed by the Chong brothers and left with Messrs Lee Tain Soong & Co, who also proceeded to lodge a caveat on the appellant's behalf.

[6] The appellant claimed that the Chong brothers defaulted in their repayment of the said loan. The appellant then proceeded to register the said land into its own name. This was all done some 29 years ago, on 27 February 1987. All the Chong brothers have since passed away, long before the civil action was filed.

A [7] The appellant claimed that in 2015, it discovered that the said land was occupied by the first three respondents without its knowledge, consent and/or permission. The appellant also found several wooden houses and other structures built on the said land together with electricity connections to the said land and the houses. The appellant subsequently found the fourth and
B fifth respondents were also occupying the said land, and they were then added in as additional defendants and now, respondents.

[8] In January 2016, the appellant filed an originating summons seeking
C vacant possession of the said land pursuant to O 89 of the Rules of Court 2012. That originating summons was dismissed on the ground that there were triable issues. The appellant then filed a fresh action against originally, three respondents seeking, inter alia, declaratory orders that it is entitled to vacant possession of the said land, that the respondents do deliver vacant possession
D and that these respondents remove all buildings and structures that they have erected on the said land.

[9] At this point, some explanation of the parties before us is called for. Now, at the time of the original action, the three respondents sued by the
E appellant were the first respondent, wife of Chong Eang Kui (deceased); the second respondent, wife of Chong Shak Khim (deceased); and all other persons occupying the said land. By the time the action went to trial, the second respondent had vacated the said land.

F [10] After the action was filed, the fourth and fifth respondents stepped in, bringing the number of respondents in the original action to five. They were the sons of Chong Eang Kui (deceased) and Chong Shak Khim (deceased), respectively. They claimed to be the beneficiaries and suing on behalf of
G themselves and other beneficiaries of the estates of the respective deceased. Both the fourth and the fifth respondents did not secure the usual letters of administration before stepping into the proceedings.

[11] These two respondents together with the first respondent wife of Chong
H Eang Kui (deceased), counterclaimed against the appellant; John Voo who by the time of the action had also passed away and was represented by his personal representative; the personal representatives of Tan Lo Ming, deceased (one of the Chong brothers), and the Registrar of Titles.

I [12] The five respondents in the original action, as beneficiaries of the Chong brothers, denied the claim and challenged the validity of the transfer of title to the appellant. According to their amended defence and counterclaim, the respondents claimed that since 3 June 1969, the Chong brothers were the legal and beneficial owners of the said land, with the first two of the three

brothers having inherited it from their mother on 3 June 1969 and, on 10 July 1972, Chong Shak Yong transferred 250/1418 share in the said land to Tan Lo Ming.

[13] The respondents claimed that during their lifetimes, the Chong brothers together with their respective families lived in dwelling houses and other structures built on the said land, and that they continued to live on the said land even after the demise of the Chong brothers, without any interference or objection from any party, including the appellant. This must mean that the appellant knew of their occupation, possession and use of the said land and dwelling houses.

[14] The respondents, on the other hand, only became aware that the said land had been transferred to the appellant when the appellant filed the originating summons seeking eviction and vacant possession. They made some enquiries and obtained several documents; namely an agreement dated 9 August 1983 between the Chong brothers and Tan Lo Ming, deceased, to develop the said land into a housing estate (development agreement); a power of attorney appointing John Voo with specific powers and authority relating to the development agreement; a deed of cancellation dated 6 October 1986 wherein with the consent of Tan Lo Ming, deceased, the development agreement had been cancelled with effect from 6 October 1986; and a deed of revocation also dated 6 October 1986 revoking the PA with Tan Lo Ming's consent.

[15] The respondents alleged that the transfer of the said land to the appellant was procured by fraudulent means, that is, by use of the 'purported loan agreement and the impugned Memorandum of Transfer being void and fraudulent instrument'. The details of the fraud may be found at para 21 of the amended defence and counterclaim.

[16] Amongst those details is the allegation that the loan agreement is fraudulent and a sham; that John Voo had acted beyond the powers conferred under the power of attorney; that neither Chong brothers nor John Voo had signed the impugned memorandum of transfer in the appellant's favour; that the loan agreement and the impugned memorandum of transfer 'were instruments of fraud to procure and illegally procured the transfer of the said land to the plaintiff'.

[17] Specifically, the allegation was that John Voo was authorised to apply for loans only from banks or financial institutions for the development of the said land, and not from entities such as the appellant. Further, the memorandum of transfer was only for the purpose of transfer of the said land to a purchaser and for subdivision of the said land; and not for transfer to the appellant.

[18] In their counterclaim, the first, fourth and fifth respondents sought declaratory orders nullifying or invalidating the transfer and registration of the said land to the appellant, and for an order reinstating the interests of the Chong brothers. The counterclaim against the appellant and John Voo is also for damages arising from the fraud, and against the Registrar of Titles is for consequential orders, in the event the counterclaim is allowed. There is no claim, general or specific, against the personal representatives of Tan Lo Ming (deceased).

[19] The personal representatives of Tan Lo Ming (deceased), did not defend the counterclaim brought against them. The first, fourth and fifth respondents subsequently informed the trial judge that they were not pursuing the claim against John Voo in respect of prayers (4) and (5), that is, claims for damages and costs. This followed evidence adduced at trial that John Voo had passed away on 20 July 1999.

[20] In its amended reply to amended defence and amended defence to the amended counterclaim, the appellant:

(a) challenged the locus standi of the respondents to bring the counterclaim;

(b) claimed:

(i) that it had no knowledge of the existence of the development agreement, the deed of cancellation and the deed of revocation, until the O 89 proceedings;

(ii) that in any case, the deed of revocation did not affect the validity of any act or thing that had been carried out by the Registrar of Titles by virtue of the PA, before the date of the deed of revocation;

(c) denied the allegations of fraud, and contended that on a proper construction of the loan agreement, John Voo acted within the power and limits of the PA; and that the arrangements between the parties was purely contractual as set out under the loan agreement made between the appellant and the Chong brothers; and

(d) claimed that:

(i) pursuant to the loan agreement, the Chong brothers had provided the title deed to the said land as security together with the memorandum of transfer executed in escrow, both documents being kept in the custody of Lee Tain Soon, the lawyer who prepared the loan agreement;

(ii) the Chong brothers defaulted when they failed to repay the loan on the due date as agreed under the loan agreement;

(iii) a caveat was registered against the said land on 26 September 1986; A

(iv) the memorandum of transfer in its favour was registered on 27 February 1987;

(v) as the registered owner, it has been paying the quit rent for the said land; B

(vi) it has not given permission and/or consent to any person(s) to occupy the said land and had no knowledge of the same; and

(vii) between 1986 and 2016, it was never contacted by the Chong brothers and/or their representatives in respect of the said land, and/or the title deeds to the said land. C

[21] The appellant further alleged that the counterclaim was time-barred under s 3 of the Limitation Ordinance (Sabah Cap 2) read with item 77 of the Schedule to the Ordinance. D

ISSUES FOR TRIAL/DETERMINATION

[22] Aside from the issue of whether John Voo had exceeded his mandate under the power of attorney granted to him, and whether the loan agreement and consequently the transfer was null and void, the issues that arose for determination at the High Court included the question of whether the respondents had the necessary locus standi to maintain their counterclaim. E F

DECISION OF THE HIGH COURT

[23] On the issue of locus standi, the learned judge answered in the affirmative, taking the view that the respondents as the legal beneficiaries of the respective estates had an equity in the estates to entitle them to seek declaratory relief for the purpose of protecting and procuring the assets of the estates. Since the intent of the appellant's action is to evict the respondents from the said land, the respondents were said to be 'in danger of losing the said land and naturally it is only reasonable that they would be trying to preserve and protect the asset of the estate'. According to the learned judge, this amounted to special circumstances within the principle laid down by the Federal Court in *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297. G H

[24] The learned judge was further satisfied that the discrepancies in the spelling of Chong Eang Kui and Chong Shak Yong's names in the relevant birth certificates of the respondents were well accounted for and did not affect his ruling on the matter of locus standi to initiate the claim. I

[25] As for the matter of John Voo's power of attorney ('PA'), the learned judge found John Voo to have acted outside the PA in several respects.

[26] First, according to recital 2 of the loan agreement read with cl 10, John Voo was supposed to secure a loan for the development of the said land into a housing estate. Clause 10 authorised John Voo to mortgage or charge the said land as security or collateral for such purpose. However, he was only to secure such loan from any bank or financial institution, not from a money lender such as the appellant. Further, under cll 7(e) and 8 of the PA, John Voo was only authorised to execute a memorandum of transfer for the limited purpose of subdivision and conversion of the said land for development and for selling the developed properties to potential buyers.

[27] Consequently, John Voo was in breach of the terms of the PA when he took the loan from the appellant for the purpose of a 'turn over' repayable in two months; the loan was not from a bank or financial institution but a typical money lender transaction for personal use; and when he signed the memorandum of transfer as a security instrument for this unauthorised purpose. Since John Voo had no requisite mandate, the transfer of the said land to the appellant was said to be invalid.

[28] The learned judge further found the transfer invalid because at the time of the execution of the memorandum of transfer on 26 February 1987, the PA had already been revoked vide deed of revocation dated 6 October 1986.

[29] The learned judge also found the transfer to be 'tainted with fraud making it void and invalid'. However, no reasons or elaboration was provided for this conclusion.

[30] Be that as it may, the learned judge proceeded to dismiss the appellant's action finding that on a balance of probabilities, the appellant 'had no cause of action' against the respondents. The counterclaim was allowed for the same reasons — the learned judge had held that 'Based on the aforesaid reasons, I am of the opinion that the plaintiff in the counterclaim has successfully proved their claim'. The learned judge found that the 'transfer of the land to the defendants was done based on invalid document'.

OUR ANALYSIS AND DELIBERATIONS

[31] The parties to the dispute and thereby the appeal before us are the appellant and the first five respondents, since the sixth respondent, the personal representatives of Tan Lo Ming, deceased did not claim or assert any interest in the said land nor did they participate in the proceedings before the High Court. Neither did the late Tan Lo Ming nor his family reside on the said land. His

personal representatives advised the court that he would abide with whatever the court decides. The Registrar of Titles is also a nominee party to the proceedings, brought in for the purpose of effecting any eventual order that may be rendered in the respondents' favour.

[32] Before dealing with the arguments presented, we must record our observations on the position of the sixth respondent, representing the late Tan Lo Ming. Informing the court that he will abide by the decision of the court is a long way off from being entitled to and being granted reliefs that this party is not even asserting or claiming in court. Thus, the orders made by the learned judge that extended to this sixth respondent is plainly erroneous and must be set aside, even without delving into the substantive merits of the appeal. This becomes more apparent when we consider the submissions of the respective parties.

[33] Essentially, the appellant's claim is for vacant possession while the respondents' counterclaim revolved around the single issue of the validity and enforceability of the loan agreement and the PA. Such claims, frequently made by the registered owners of land, are not unusual in the daily lists of the trial courts. The appellant's claim is no exception. Its claim is premised on its registered ownership of the said land. If the appellant's title is not challenged or the challenge is unsuccessful, the appellant, as the registered owner of the said land, is entitled to approach the court for the remedy of vacant possession against the respondents upon proof that the respondents' occupation is without the prior consent, permission and/or licence from the appellant. Absent the establishment of valid legal grounds for refusing to vacate, possession must be ordered to such registered owners.

[34] In the present appeal, the appellant's claim was refused after the learned judge found for the respondents' counterclaim. That counterclaim turned on the interpretation and construction of the terms of the loan agreement, the PA and the memorandum of transfer, prepared in escrow under the loan agreement and the PA. It was the learned judge's construction of these documents that led to the counterclaim being allowed, and the dismissal of the appellant's claim. The High Court granted, inter alia, declaratory orders nullifying or invalidating the transfer and registration of the said land to the appellant, and further ordered the reinstatement of the Chong brothers' interests on the said land.

[35] On the issue of the respondents' locus standi to maintain the counterclaim, we note that the appellant is not putting any strenuous arguments that the respondents lack such capacity. Based on the Federal Court's decision in *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297, we agree with the learned judge's findings that the respondents may

file their claim as beneficiaries sans letters of administration, as their counterclaim is filed to protect and preserve the estates of two of the deceased Chong brothers and such intent amounts to special circumstances within *Al Rashidy*.

[36] Turning then to the challenge on the appellant's registered title to the said land. In defending the claim for vacant possession arising from this title to the said land, the respondents alleged that the registration of title to the said land in the name of the appellant is illegal and void as it is vitiated by fraud, that the memorandum of transfer is an instrument of fraud.

[37] In response, the appellant denied the presence of fraud; that in any case, the allegation of fraud is not maintainable as the allegations are not made against the appellant but against John Woo, the perpetrator of the fraud. Such allegations lead nowhere as the claim against John Woo has also been since withdrawn.

[38] The appellant next submitted that as a claim founded on fraud or relies on fraud as the basis of its action, the counterclaim must nevertheless be filed within the time period prescribed under s 3 read with item 77 of the Schedule to the Limitation Ordinance (Sabah Cap 2). Since it was not, the counterclaim is clearly time-barred and must be dismissed, in which case, the appellant's claim must be allowed.

[39] We are of the considered view that the issue of limitation must be dealt with first. If the appellant's arguments are of merit, that s 3 read with item 77 of the Schedule to the Limitation Ordinance of Sabah bar the respondents' claim even if there was a claim, we agree that it is a complete defence and the respondents' claim must be dismissed. That would leave the learned judge the matter of considering whether the appellant's claim for vacant possession under O 89 of the Rules of Court 2012 is proved and ought to be allowed.

[40] Unfortunately and erroneously, this pleaded and submitted issue was not dealt with by the learned judge.

[41] On this issue of limitation, we agree with the submissions of learned counsel for the appellant. Even on the assumption that there was fraud, which the appellant denies and to which we agree for reasons which will be discussed in due course, the counterclaim and thereby the defence mounted to challenge the appellant's title to the said land, was clearly time-barred and ought to have been dismissed. Limitation, if proved, is a complete defence to the counterclaim. And, as we shall soon see, the appellant's defence of limitation is of merit and ought to have been so considered by the learned judge. We are of the firm view that the counterclaim ought to have been dismissed on the sole

ground of limitation and the appellant's claim thereby, allowed. This is how the limitation argument ought to have been addressed.

[42] The defence and the counterclaim in essence, seeks to disabuse the appellant of their title registered in 1987. Since the registration was effected nearly 30 years ago with the respondents' counterclaim filed on 6 January 2017, such a claim, ex facie, is time-barred unless there is some compelling reason or principle of law which allows this counterclaim to be brought some 30 years later.

[43] In the counterclaim, the respondents relied on and pleaded the presence of fraud in the events leading up to the registration of the said land in the appellant's name. The respondents claimed that they were not aware that the said land had been transferred to the appellant and thereby too, the fraud committed by the appellant, until they were served with the cause papers relating to the O 89 application in 2016. Consequently, the period of limitation under item 77 of the Schedule to the Limitation Ordinance (Sabah Cap 2) should only start from that date, making their counterclaim cum defence, valid and in time.

[44] With respect, we disagree.

[45] Section 3 of the Limitation Ordinance (Sabah Cap 2) mandates that all civil suits must be filed within the relevant prescribed periods of limitation, otherwise such actions must or 'shall be dismissed':

> 3. Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed.
>
> Provided that limitation has been set up as a defence.

[46] The applicable period of limitation in any given action differs depending on what the claim is. Items 92 and 110 of the Schedule had been suggested. In the context of the present appeal, as a claim to cancel or set aside an instrument not otherwise provided for and in the absence of any allegation of fraud, item 73 of the Schedule to the Limitation Ordinance prescribes that the limitation period is three years from 'when the facts entitling the plaintiff to have the instrument cancelled or set aside becomes known to him'. That same period is prescribed for a claim under item 92. As a claim for possession of immovable property or any interest in immovable property, once again, in the absence of any allegation of fraud, the period of limitation is twelve years from 'when the possession of the defendant becomes adverse to the plaintiff' or from 'the date of the dispossession or discontinuance' — see items 110 and 112 of the Schedule to the Limitation Ordinance. We would see these provisions of

the Limitation Ordinance as most relevant or applicable to the facts in this appeal.

[47] In all these situations, the limitation period runs from different points in time and for different durations, be it three or twelve years.

[48] However, once fraud is alleged, s 18 of the Limitation Ordinance must be taken into consideration. Section 18 concerns the effect of fraud and serves to defer the computation of time in the following terms:

> 18 When any person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit —
>
> (a) against the person guilty of the fraud or accessory thereto; or
>
> (b) against any person claiming through him otherwise than in good faith and for a valuable consideration,
>
> shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

[49] For the purpose of the present appeal, s 18 must be read with item 77 of the Schedule. Item 77 provides that the period of limitation for a claim (and that would include a counterclaim) to set aside a decree obtained by fraud, or for other relief on the ground of fraud is three years when the fraud becomes known to the party wronged. Consistent with s 18, this three-year period runs from when the fraud becomes known to the party wronged, or the party having a right to institute a suit. It is critical to note that both s 18 and item 77 provide that it is the knowledge of the party or parties wronged or the party who is to institute the suit that is relevant. Time starts from when the victim or the party wronged or injuriously affected knows of the fraud, or when the fraud becomes known to such party. If we are dealing with the case of a concealed document, it would be when the person having a right to institute a suit had the means of producing the concealed document or compelling its production. This scenario does not arise in the present appeal.

[50] We take the view that in either case of s 18 or item 77, the party is necessarily the Chong brothers, and not the respondents. Time and thereby the right to sue would be when the fraud first became known to the Chong brothers that is of any relevant consideration, as apparent from the clear terms of s 18 and item 77. It is not when the respondents came to know of the fraud, assuming there is fraud.

[51] The right of action seeking to set aside the registration of title to the said land on the ground of fraud belongs to the Chong brothers, and not to the respondents. This is because any complaint of fraud can only be properly made by the Chong brothers as the allegations of fraud relate to the loan agreement, the PA and the memorandum of transfer, all of which are matters that are personal and within the knowledge of the Chong brothers themselves and no other.

[52] It is only after the Chong brothers' claim is successfully established that the respondents, as beneficiaries, can begin to assert any claim or interest, as their claim to remain on the said land emanates from the claim that was supposedly that of the Chong brothers. Any assertion of interest or right to be on the said land starts with interests or rights of the same belonging first to the Chong brothers. If that fails, there would be no interest or right for the respondents, as beneficiaries to assert.

[53] The respondents, as beneficiaries of the Chong brothers, do not have any separate or independent right of action in respect of the said land. In fact, there is no suggestion by them that there is, be it in the pleadings or the submissions. This is plain given the respondents' action is entirely to protect, preserve and enforce the rights and obligations of the estates of the Chong brothers, the reason for their claim of special circumstances under *Al Rashidy*, the matter of locus standi that we considered at the outset.

[54] A perusal of the amended defence and counterclaim further reflects and confirms the respondents' own understanding and position of their right of action. The respondents' counterclaim is mounted on matters that emanate from and relate to the loan agreement, PA and the memorandum of transfer, all of which the respondents seek to vitiate.

[55] The reliefs sought fortify our conclusion that the respondents do not claim any separate identifiable right of action. Their claim is entirely representative of each of the estates of the Chong brothers. The respondents sought to declare the transfer of title of the said land to the appellant as null and void, followed by a cancellation and a deletion of the memorial entered in favour of the appellant's title and interest to the said land, before finally seeking an order to reinstate and re-enter the interests of the Chong brothers to the said land. If the counterclaim is allowed by the court, the respondents remain beneficiaries and indirect parties who will always require letters of administration to be extracted before they can take their interests and right to remain on the said land any further.

[56] This distinction is important as it draws home the fundamental point that is made by the appellant on the matter of limitation, that it is the Chong

brothers who can properly claim to be the party wronged and never, the respondents, for the purpose of computing the period of limitation under item 77 of the Schedule.

[57] Now, where limitation is asserted or relied on, the burden of proof is on the respondent as the plaintiff in the counterclaim, to show that the counterclaim was commenced within the prescribed period of limitation. Once that has been established, the burden then shifts to the appellant as defendant in the counterclaim to prove that the fraud was known earlier or more than three years prior to the suit being filed. If the appellant fails to establish that, then the respondents' claim on the date of knowledge would stand.

[58] This legal position was explained in *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504 and also in *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799; [2014] 2 CLJ 445 by the Federal Court as follows:

> [60] On onus of proof, in *Nanji & Co v Jatashankaar Dossa* 1961 AIR 1474, where on the right to sue 'within three years from the date of his coming to know of a fact', the Indian Supreme Court held that it is the duty of the plaintiff to establish, at any rate, prima facie, that the suit is within time and is not barred by lapse of time. 'The onus is on the plaintiff to prove that he first learnt within three years of the suit ... In other words, he has to prove that he obtained the knowledge ... within three years of the suit, and that is all. If he proves this, then to succeed on the plea of limitation, the defendant has to prove that the fact ... became known to the plaintiff more than three years prior to the suit (see p 1479 of the report; see also *Gunabai v Motila* 1925 Nagpur 398, 400). If the defendant fails to do that, the allegation of the plaintiff as to the date of knowledge stands unrebutted (*Nibaran v Nirupama* AIR 1921 Cal 131. Where there is no proof of the date when it became known, the action is time-barred (see *Kalyan Mal v Ahmad Uddin* AIR 1934 Privy Council 208). 'When it is doubtful at what precise time the fraud became known to the plaintiffs, the onus is on the defendant to show that the suit is out of time (*Rahimbhoy v Turner*)' (*Moidiyan's son Punnavil Kuttu v Raman Nair* 1908 Indian Law Reports Madras Series Vol XXXI 230).

[59] Consequently, the burden was on the respondents to show that the claim which should or would have been brought by the Chong brothers in their lifetimes is not caught by s 3 read together with s 18 and item 77 of the Limitation Ordinance. And, in this regard, we agree with the appellant that the respondent had failed to so establish. This was an important point that was not properly considered by the learned judge and which has such a significant impact on the outcome of this appeal.

[60] In this regard, the decision of the Court of Appeal in *Sha Kannan & Anor v Arunachalam a/l Venkatachalam & Anor and another appeal* [2017]

MLJU 1568; [2017] MLRAU 1, is relevant. In that appeal, the appellants who were the executors of their late father's estate sought the return of the original documents of title of all immovable assets of the deceased from the respondents; the return of the blank transfer forms executed in escrow by the deceased; a declaration that the transfer of certain properties of the deceased to the respondents was void and illegal; and to order the Registrar of Land Titles to cancel and restore the deceased as the rightful owner.

[61] It was undisputed in that appeal that the deceased and the beneficiaries of the estate of the deceased had borrowed monies from the respondents. The borrowings were evidenced in two documents written in Tamil; one of which was witnessed by the appellants themselves. The appellants sought to set aside the transfer on the basis the two documents were obtained by coercion and misrepresentation.

[62] The respondents relied on the defence of limitation, that the claim was time-barred under the Limitation Act 1953. The High Court agreed with the respondents and the claim was dismissed.

[63] In upholding that decision, the Court of Appeal found that the two documents and the relevant memorandum of transfers were signed in 1997 and 1998 respectively. The six year period had lapsed by over 17 or 18 years by the time the claim was filed.

[64] On the appellants' contention that they did not discover the fraudulent transfers of the land 'until recently' and that there was coercion and misrepresentation, the Court of Appeal held that 'there was not one iota of evidence to show such coercion or misrepresentation'. Further, the Court of Appeal held that:

> [30] ... The acts of coercion and misrepresentation must have been asserted on those two persons who signed the two Tamil documents ... Even if there were verbal complains as alleged in the pleadings, no action was taken by the late father and the appellant ... This inaction can only lead to one irrefutable conclusion and that is they knew what they had signed and they had no complaints on the two Tamil documents.
>
> [31] Further, it should be noted that if there were causes for complaints, they were personal to the people privy to the two Tamil documents. And when they did not take out any legal suit, limitation sets in and in this case there had been a delay of 17 to 18 years and no explanation by anyone privy to the transactions to explain why there was inaction.

[65] The Court of Appeal also applied the doctrine of laches to bar the legal actions, that there was 'little doubt that the delay had highly prejudiced the respondents' position in properly defending the claim. A span of 18 years is a

long time to say the least. Equity demands that litigants on both sides are not put in a position where one side is put in an unfavourable position by the delay of the other side. The courts must ensure that the playing field is fair to all'.

[66] We hold that those same considerations apply in our present appeal.

[67] We further agree with the submissions of the appellant that assuming that there was fraud, it would have been perpetuated by John Voo when he, without authority or in excess of his authority under the PA dated 9 August 1983, signed the loan agreement and executed the memorandum of transfer in escrow. This is borne out by para 31 of the respondents' own defence and counterclaim where the respondents pleaded:

> 31. Further, the said Plaintiffs aver that the purported transfer of the said land to the Plaintiff was procured by fraud and the Plaintiff had unlawfully obtained title to the said land by fraudulent means using the purported Loan Agreement and the impugned memorandum of transfer being void and fraudulent instrument. In the aforesaid premises, the purported transfer of the said land to the Plaintiff was illegal and null and void.

[68] Initially, the respondents had sued John Voo as the sixth defendant but that counterclaim was withdrawn as John Voo had passed away even before the counterclaim was filed; he had passed away on 20 July 1999. In our view, this inclusion of John Voo shows the respondents' acknowledgment of John Voo's actions, that the allegations of fraud are really a challenge of John Voo's actions, that his actions were the fraudulent means, and the memorandum of transfer executed in escrow, a fraudulent instrument. Thus, the relevant time for purposes of computing limitation under the Limitation Ordinance would be when these acts were committed.

[69] We now trace back the various acts involved. The application for the loan was made by John Voo using the then existing law firm of Messrs Lee Tain Soong & Co. Vide letter dated 10 March 1984, these solicitors informed the appellant that it would keep the issued copy of title to the said land, lodge a caveat in the appellant's favour before releasing the loan, and agreed to transfer the said land to the appellant should the Chong brothers fail to repay the loan with interest accrued. Both the loan agreement and the memorandum of transfer in escrow were executed on 10 March 1984.

[70] Under the terms of the loan agreement, the Chong brothers were required to repay the loan of RM60,000 within two months from the date of borrowing. However, under cl 6, the appellant, as lender, agreed to let the Chong brothers 'have an extension of two months upon the expiry of this Agreement should the Borrowers so required'.

[71] Now, pursuant to cl 3 of the loan agreement, the parties also agreed that: **A**

> If the Borrowers shall default in the payment of the Loan on the due date stipulated under Clause 1 hereof or in the performance of any of the covenants contained herein it shall be lawful for the Lender forthwith to transfer the said Land into the Lender's name or his nominee or nominees.

B

[72] The appellant gave the full loan of RM60,000 to the Chong brothers. However, the Chong brothers defaulted in repayment.

[73] On 27 February 1987, the appellant, presented the memorandum of transfer that had been prepared in escrow, for transfer, and the title to the said land was duly registered in the appellant's name with effect from that date. **C**

[74] Against that backdrop of irrefutable facts, any allegation of fraud must necessarily be pitched against or relied on the loan agreement itself which is dated 10 March 1984, the alleged wrongful signing of the memorandum of transfer in escrow also done on 10 March 1984; or, the transfer of the title to the appellant and that would be 27 February 1987. **D**

[75] The time period of three years runs from 10 March 1984 and would expire on 10 March 1987. Assuming that there is fraud, the claim ought to have been filed by the Chong brothers within three years from those dates mentioned. Since the action was only filed by the respondents on 20 February 2017, the respondents' counterclaim is clearly time-barred. Even accepting that time runs only from the time of the transfer, that is, from 27 February 1987, the counterclaim remains barred under the statute of limitations of Sabah. As mentioned earlier, this defence of limitation is a complete defence and ought to have been so dealt with by the learned judge. This is reason enough for us to intervene in this appeal. **E** **F**

G

[76] In any case, we agree with the appellant that even assuming that there is fraud, there is nevertheless a substantial body of evidence before the court that showed and confirmed the appellant's stand that the Chong brothers had the requisite knowledge for them at the material time to institute action. The evidence led by the appellant amply revealed that the Chong brothers themselves were actually aware of the loan taken by John Voo from the appellant; the implications of any failure to repay the loan taken from the appellant; and of the subsequent transfer of title to the said land and registration in the appellant's name. Yet, they did nothing. **H**

I

[77] That evidence just mentioned includes the cancellation of the PA by the Chong brothers themselves on 6 October 1986. Although the persons who could explain the reason for the cancellation are no longer available, it is nevertheless reasonable to conclude that the cancellation of the PA was a

decision reached after the Chong brothers had personally applied their minds to the matter of whether to cancel or revoke the PA. Amongst the terms of the revocation of the PA is the following pertinent term which states that any acts already done by John Voo prior to the date of revocation, and that would include the signing of the loan agreement and the memorandum of transfer, remains valid and unaffected by the revocation:

> NOW THIS DEED WITNESSETH that we HEREBY REVOKE the said deed of power of attorney and every power and authority thereby conferred upon the said John Voo Hong Kong provided that nothing herein contained shall affect the validity of any act or thing done by the said John Voo Hong Kong by virtue of the said deed of power of attorney before the date hereof.

[78] Both the PA and the deed of revocation were prepared with the assistance of solicitors. The PA pertained to the borrowing of funds for development of the said land. The deed of revocation of the PA was prepared by M/s Paul Kan & Co and the signatures attested too, by solicitors.

[79] Under such circumstances, we agree with the submissions of learned counsel for the appellant that it would be 'common life occurrence and experience', in fact a matter of common sense, good and responsible conduct, that the Chong brothers would have requested the return of the documents of title to the said land from John Voo. They must have handed over the documents of title to John Voo in the first place and a revocation logically will require a return of those same documents. Since the titles were not returned, we agree with the appellant that the Chong brothers must have known of the alleged fraud. Given that the status of titles may be searched for at the land office, the Chong brothers who obviously had access to solicitors must also be taken to have known of the dealings in respect of the said land, including the caveats entered by the appellant. Still, they did nothing.

[80] Yet another piece of evidence is the payment of the annual quit rent in respect of the said land. The evidence led showed that the Chong brothers ceased payment of quit rent from 1986 and that it was the appellant who went on to make that annual payment.

[81] The quit rent for the said land is the sum of RM17 that is paid to the Lands and Surveys Department. The evidence led at trial showed that the appellant paid the quit rent for the years 1988–1991 on 21 November 1991, an aggregate sum of RM68 (see receipt at p 368 of R/Appeal 2B), and continued to pay the quit rent from 1992 until 2015 (see p 480 of R/Appeal 2C). The Chong brothers themselves did not pay any quit rent after 1986; neither did any of them query why someone else including the appellant was paying the quit rent for them. In our judgment, this corroborates the appellant's

submission that the Chong brothers knew of the existence of the appellant and had no issue with the title being registered in the appellant's name.

[82] There was no evidence led by the respondents to disprove the above conclusion.

[83] As shown by the appellant, none of the respondents were able to throw any light on this critical element of knowledge of the fraud allegedly committed by John Voo, assuming there was any in the first place. The respondents themselves testified that all matters relating to the said land were handled by the Chong brothers themselves — see evidence of DW2 and DW3. Consequently, the respondents have failed to discharge the burden of proving that the counterclaim was commenced within the prescribed period of limitation. In the result, the counterclaim must be dismissed under the terms of s 3 of the Limitation Ordinance.

[84] We add that this lack of action of over 26 years, particularly by the Chong brothers, not only confirms the appellant's case that the whole transaction in relation to the loan of RM60,000 was entirely valid, that same long lapse of time compels the court to invoke the doctrine of laches, that stale claims, for good reasons as illustrated in this appeal, cannot be allowed.

[85] With the respondents' failure to establish their defence to the appellant's action for possession as owner of the said land, and in the face of documentary evidence of the appellant's title to the said land, we are of the unanimous view that the appellant's claim ought to have been allowed.

[86] We further agree with the appellant that in any case, there was no fraud proved, particularly in relation to the appellant. Quite aside from the fact that fraud was not alleged specifically against the appellant but against John Voo, the learned judge nevertheless found the loan agreement 'tainted with fraud making it void and invalid' when upon construction of the terms of the PA, His Lordship found that John Voo had exceeded his powers under the PA.

[87] His Lordship had, after examining the PA for its extent, took the view that the PA was created for the development of the said land into a housing estate. Reading recital 2 of the PA together with cll 7(e) and 10 of the PA, His Lordship concluded that John Voo was authorised to mortgage or charge the said land as security or collateral for such development loan and finance which John Voo was obliged to obtain from any bank or financial institution. However, under cl 7(e), John Voo was only 'authorized to sign and deliver any memorandum of transfer and other consequence of the said land for the purpose of subdivision and conversion of the said land for development and for

A the purpose of selling the properties to potential buyers'. In other words, John Voo's authorised powers under the PA were qualified or limited by the clauses identified.

B **[88]** Because the loan of RM60,000 that was taken from the appellant was for a 'turn over' repayable within two months, and not from any bank or financial institution but from the appellant, a money lender, the learned judge concluded that the 'such loan is definitely not for the development of the said land'. The learned judge was of the opinion that in any loan for development, the repayment is 'extended for a considerable time to enable the borrower to C kick start the development. The nature of the loan agreement between the plaintiff and the Attorney is consistent with a typical money lender transaction for personal use'.

D **[89]** With respect, even in this regard, we disagree.

[90] When the defence and counterclaim is properly examined, it will be seen that the allegation of fraud arises at para 21:

E 21. By reason of the matters aforesaid, the Beneficiaries aver that the impugned memorandum of transfer was a void and fraudulent instrument and the purported transfer of the said land to the Plaintiff relying on the impugned memorandum of transfer was fraudulent and null and void.

PARTICULARS OF FRAUD

F (1) Chong Brothers did not sign or enter into any or the purported Loan Agreement (unstamped) with the plaintiff as alleged. Further, the sixth Defendant did not sign or enter into the purported Loan Agreement as the lawful attorney for Chong Brothers pursuant to the power of attorney. The purported Loan Agreement was a sham and fraudulent. In the premises, G there was no loan agreement ever entered into between the Plaintiff and Chong Brothers or on their behalf.

(2) The sixth Defendant had no authority to sign or enter into any or the purported Loan Agreement as the attorney of Chong Brothers save and except for the purposes relating to the development of the said land H pursuant to the Agreement and the power of attorney.

(3) In any event, neither Chong Brothers nor their lawful attorney had signed the impugned memorandum of transfer of the said land in favour of the Plaintiff.

I (4) Further, the sixth Defendant had no authority to act as attorney on behalf of the Chong Brothers to sign the impugned memorandum of transfer of the said land on 26.02.1987. In signing the impugned memorandum of transfer as alleged, the sixth Defendant had acted fraudulently.

(5) In the premises, the purported Loan Agreement and the impugned memorandum of transfer were instruments of fraud to procure and had illegally procured the transfer of the said land to the Plaintiff.

[91] Although the respondents claimed that the Chong brothers never signed any loan agreement, it must be appreciated that that was never the allegation or claim of the appellant. The undisputed fact is that John Voo signed the relevant documents under the PA given by the Chong brothers. It was never the appellant's case that the Chong brothers personally signed the loan agreement. It was John Voo who did so under the mandates given to him under cover of the PA as prepared by the Chong brothers.

[92] Be that as it may, it would have been necessary for the respondents to prove their allegations of fraud as against John Voo first before any claim may be made against the appellant.

[93] Fraud is necessarily fact centric and a matter of evidence. Since the claim was withdrawn against John Voo who was the sixth defendant, and with none of the respondents being in any position to explain the PA, the loan agreement or even the deed of revocation and the development agreement, having only realised the existence of these documents after the appellant's action was initiated, we are unable to rationalise how the learned judge could conclude that the loan agreement and thereby the transfer of title to the appellant was invalid and void as they were tainted with fraud.

[94] The matter of John Voo's powers and authority is further a question of construction of the terms of the PA. Even if, for argument's sake, the donee of the PA, that is, John Voo is in breach of the terms of the PA or has exceeded his mandates under the PA, that is still a long way from asserting and concluding that such breach or excess of authority amounts to fraud that taints the actions taken by John Voo.

[95] What amounts to fraud? That question, as opined earlier, is very much dependent on the facts and allegations as pleaded. In *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31, the Federal Court said, inter alia, at p 35:

> As regards the law, it has been said that the courts have so far not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true. Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming benefit of it is able to repel the presumption by contrary evidence proving to have been in point of fact, fair, just and reasonable per Lord Selborne, LC in *Earl of Aylesford v Morris* (1873) 8 Ch App 484; see also *Fry*

v Lane 40 Ch D 312.

[96] In that same decision, the Federal Court cited with approval, the views expressed in *Assets Company Limited v Mere Roihi and Others (Consolidated Appeals)* [1904-07] All ER Rep Ext 1599; [1905] AC 176 and *Waimaiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101, which views are highly relevant in our appeal. In *Assets Co Ltd v Mere Roihi & Ors*, Lord Lindley said at p 210:

> Fraud in these actions (ie, actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one vey apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

[97] Whilst, in *Waimaiha Sawmilling Co Ltd v Waione Timber Co Ltd*, Lord Buckmaster shared the same opinion:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.

[98] These decisions were followed in *Lim Kim Hua v Ho Chui Lan & Anor* [1995] 3 MLJ 165, a case where the plaintiff was seeking, inter alia, for a declaratory order that the two memoranda of transfer were null and void because of fraud, dishonesty and undue influence. Steve Shim J (as His Lordship then was) explained that:

> At the outset, I should state that the term 'fraud' has undergone both statutory as well as judicial definition. Under s 17 of the Contracts Act 1950, fraud is defined as including any of the following acts committed by a party to a contract or with his connivance or by his agent, with intent to deceive another party thereto, or his agent, or to induce him to enter into the contract; (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true; (b) the active concealment of a fact by one having knowledge or belief of the fact; (c) a promise made without any intention of performing it; (d) any other act fitted to deceive; and (e) any such act or omission as the law specially declares to be fraudulent.

[99] It is therefore necessary for the respondents to prove actual fraud, as their challenge is against the registered title of the appellant. Similar views have been expressed in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen* [1998] 1 MLJ 465; *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196; *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 and *Hj Suratmin bin Hj Othman v Yusof bin Hj Omar & Ors* [1997] MLJU 203; [1988] 2 CLJ Supp 380.

[100] Even a finding of the existence of gross negligence is still not sufficient to say that such gross negligence amounts to fraud. This was held by the Court of Appeal in *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645; [2013] 9 CLJ 577: '... there has been no fraud on the part of the defendant; there has only been gross negligence in the ordinary sense of the words'.

[101] The burden of proving fraud and that the memorandum of transfer is an instrument of fraud lies with the respondents and the standard is on the civil balance of probabilities as decided by the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584.

[102] In our judgment, looking at the pleas of fraud as set out in the defence and counterclaim, the evidence led and the contentions of the respondents, we are of the firm view that the respondents had fallen far short of even the standard of civil liability in proving the existence of fraud. Even on a balance of probabilities, such a finding by the learned judge of the existence of fraud is not sustainable, whether in law or on the facts.

[103] Having examined the PA, we can also safely conclude that the learned judge has taken an erroneous construction of the terms of the PA, and has also failed to examine the terms of the PA together with those of the loan agreement, whether properly or at all. The PA created a relationship of principal and agent as between the Chong brothers and John Voo in which case, the provisions of the Contracts Act 1950 ought to have been duly considered, which the learned judge failed to do. As an agent cloaked with express powers as found in the PA and armed with the documents of title to the said land, we agree with the submissions of the appellant that the entry into the loan agreement and the signing of the memorandum of transfer in escrow cannot amount to fraud.

[104] It is undeniable that under cl 10, the Chong brothers had cloaked John Voo with the power and authority to carry out various 'things, matters, acts and deeds in connection with our respective right interest and title in the said land':

> ... DO HEREBY APPOINT the said JOHN VOO HONG KONG ... and all persons deriving title from him to be our true and lawful Attorney for us and in our names and on our behalves to do perform execute the following things matters acts and deeds in connection with our respective right interest and title in the said land, namely:
>
> 1. To enter upon and take possession of the said land and to ...
>
> 2. In our names and on our behalves to apply ...
>
> 3. To engage such surveyors ...
>
> 4. ...

> 5. ...
>
> 10. To mortgage or charge the said land as security or collateral for such development loan and finance which may be obtained by our Attorney (s) from any Bank or financial institution. And in this connection to sign such Memorandum of Charge of the said land undertaking and guarantee as shall be necessary, provided our Attorney (s) shall guarantee the repayment and discharge and pay for all costs and expenses incurred therewith.
>
> 11. ...
>
> 12. ...
>
> And we hereby undertake to ratify and confirm all that our Attorney (s) shall do or cause to be done by virtue of such powers herein granted.

[105] The authorisation included the power to mortgage or charge the said land as security or collateral for any development loan or finance which may be obtained by John Voo from any bank or financial institution, and to execute a memorandum of charge towards that end. Title deeds to the said land were handed over to John Voo by the Chong brothers to enable him to carry out that mandate.

[106] Any deviations from such mandates or authority by John Voo will nevertheless bind the Chong brothers to obligations owed to third parties such as the appellant that John Voo had contracted with. This is provided for under s 190 of the Contracts Act 1950 where it is clearly stipulated that the principal, and that would refer to the Chong brothers, remain liable for the unauthorised acts of their agent, John Voo:

> 190 Liability of principal inducing belief that agent's unauthorized acts were authorized.
>
> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by his words or conduct induced such third persons to believe that those acts and obligations were within the scope of the agent's authority.

[107] Further, from the terms of cl 10 read in the context of the whole PA, we are prepared to say that the authorisation to John Voo to raise funds for the development of the said land, was not necessarily restricted to banks and financial institutions, or that the appellant's business as a money lender would fall outside the understanding of that term. We cannot see how the period of the loan had any particular bearing since the sum loaned was RM60,000, not a substantial sum even for 1984.

[108] It is also our view that the fact that the loan was for a 'turnover' as seen in the application form for a loan or credit facility to the Chong brothers, does not mean that the loan was a 'personal loan'. The application form states that it

is for a 'turnover' with details or references to the name of business involved, that it is for 'Sabacity Development'. A letter of guarantee was further provided by John Voo for the purpose of the application. These pieces of evidence, which were not addressed by the learned judge, confirm that there was no reason whatsoever to doubt the appellant's case.

[109] We agree with the appellant that if fraud was at all present, the Chong brothers, none of whom passed away till sometime after the revocation of the PA and the transfer and registration of title to the said land in the appellant's name had been affected, would, in all common sense have taken the appropriate action, including seeking the return of the document of title to the said land. This inactivity or lack of action, coupled with non-payment of the quit rent by the Chong brothers as discussed earlier, invites the reasonable inference that there was in fact no fraud committed by the appellant against the Chong brothers and we will readily draw that inference in this appeal.

CONCLUSION

[110] For all the reasons discussed, we agree with the submissions of the appellant that the respondents have failed to establish that their counterclaim is not time-barred. The appellant has instead, proved that the claim is time-barred, whether the ground of fraud is applicable or otherwise.

[111] The long period of silence speaks volumes of the true status of title to the said land; that it is as claimed by the appellant. The Chong brothers had, through the PA, received the loan from the appellant, and had failed to repay as promised. Flowing from such breach of the loan agreement by the Chong brothers, and relying on the memorandum of transfer which had already been signed in escrow, it was entirely within the appellant's rights under the loan agreement, to activate the memorandum of transfer and effect the transfer of the said land to themselves. The only reasonable inference that may be reached from the Chong brothers' inaction is that they themselves recognised and acknowledged that right. The revocation of the PA does not alter that conclusion as is apparent from the terms of the deed itself which states:

> NOW THIS DEED WITNESSETH that we HEREBY REVOKE the said deed of power of attorney and every power and authority thereby conferred upon the said John Voo Hong Kong provided that nothing herein contained shall affect the validity of any act or thing done by the said John Voo Hong Kong by virtue of the said deed of power of attorney before the date hereof.

[112] There is nothing fraudulent in the acts or conduct of John Voo or the appellant. Since the appellant is the registered owner of the said land, and there is no evidence from the respondents to disprove that right or to prove their right to remain on the said land, the appeal must be allowed with costs. We

A further order that the order of the High Court is set aside and the appellant's application for vacant possession must be and is hereby allowed in the terms sought in prayers (a)–(h) as found in the re-amended statement of claim.

Appeal allowed with costs.

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Reported by Ashok Kumar

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